IN THE SUPREME COURT

OF THE UNITED STATES

* *

1976 TERM

No. [redacted]

* *

76-1150

~~MONTANA OUTFITTERS ACTION GROUP~~, LESTER BALDWIN, ~~RICHARD CARLSON~~, ~~JEROME S. HUGHEY~~, DAVID R. LEE, and DONALD J. MORIS,

Appellants,

-vs-

FISH & GAME COMMISSION OF THE STATE OF MONTANA; WESLEY WOODGERD, Director of the Department of Fish & Game of the State of Montana; ARTHUR HAGENSTON; WILLIS B. JONES; JOSEPH J. KLABUNDE; W. LESLIE PENGELLY; and ARNOLD RIEDER, Commissioners of the Fish & Game Commission of the State of Montana,

Appellees.

* *

APPEAL FROM THE UNITED STATES DISTRICT

COURT FOR THE DISTRICT OF MONTANA

* *

STATEMENT AS TO JURISDICTION

JAMES H. GOETZ
Counsel for Appellants
522 West Main Street
P. O. Box 1322
Bozeman, Montana 59715

TABLE OF CONTENTS

CITATIONS

CASES — PAGE

STATUTES

MISCELLANEOUS

IN THE SUPREME COURT

OF THE UNITED STATES

* *

1976 TERM

No._____

* *

~~MONTANA OUTFITTERS ACTION GROUP~~, LESTER BALDWIN, ~~RICHARD CARLSON~~, ~~JEROME J. HUGEBY~~, DAVID R. LEE, and DONALD J. MORIS,

Appellants,

-vs-

FISH & GAME COMMISSION OF THE STATE OF MONTANA; WESLEY WOODGERD, Director of the Department of Fish & Game of the State of Montana; ARTHUR HAGENSTON; WILLIS A. JONES; JOSEPH J. KLABUNDE; W. LESLIE PENGELLY; and ARNOLD RIEDER, Commissioners of the Fish & Game Commission of the State of Montana,

Appellees.

* *

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

* *

STATEMENT AS TO JURISDICTION

The Appellants, pursuant to United States Supreme Court Rules 13(2) and 15, file this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final order of the Statutory District Court and should exercise such jurisdiction in this case.

OPINION BELOW

The Statutory District Court for the District of Montana issued its opinion in this case on August 11, 1976. The opinion is not yet reported and has been attached hereto as a Joint Appendix.

JURISDICTION

This action was instituted on June 23, 1975, pursuant to Title 42 U.S.C. §1983, Title 28 U.S.C. §1343; 28 U.S.C. §2281; 28 U.S.C. §§2201, 2202; and Article IV, Section 2 (Privileges and Immunities) and the Fourteenth Amendment to the United States Constitution, challenging the constitutionality of the license fee system of the State of Montana for the hunting of big game (Section 26-202.1, R.C.M., 1947). The Statutory District Court, by District Judges Russell E. Smith and William Jameson, filed its opinion on August 11, 1976, denying Plaintiffs' claims. Circuit Judge James Browning filed a dissenting opinion.

The jurisdiction of the Supreme Court to review the decree of the Statutory District Court by direct appeal is conferred by Title 28 U.S.C. §1253.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this case are: Article IV, Section 2, United States Constitution and the Fourteenth Amendment to the United States Constitution. The statutory provisions involved are: Section 26-202.1, Revised Codes of Montana, 1975 version and 1976 [amended] version. The text of Section 26-202.1, R.C.M., 1975 and 1976 versions, are reprinted in the Joint Appendix to this jurisdictional statement.

QUESTIONS PRESENTED

1. Whether the Montana statutory scheme relating to big game license fees which imposes substantially higher license fees on non-resident hunters and which requires that non-residents, but not residents, purchase a "combination" license for various species of game in order to hunt big game in Montana, denies to non-resident hunters their constitutional rights guaranteed them under Article IV, Section 2 (Privileges and Immunities) and the Fourteenth Amendment (Equal Protection) of the United States Constitution.

2. Whether the Montana statutory scheme relating to big game license fees which imposes substantial burdens (financial and otherwise) on non-resident hunters but not on resident hunters, which cannot be reasonably justified on any cost basis, can nevertheless survive a constitutional challenge on the basis that political support of the local citizenry for the big game management program in Montana may evaporate in the absence of discrimination against non-resident hunters.

STATEMENT OF THE CASE

This action was filed on June 23, 1975. Plaintiffs-Appellants Carlson, Huseby, Lee and Moris are Minnesota residents who regularly hunt for big game, particularly elk, in the State of Montana. Appellant Lester Baldwin is a licensed outfitter (hunting guide) in the State of Montana whose business is substantially dependant on non-resident hunters. The Montana Outfitters Action Group is an organization whose membership consists of licensed outfitters operating in Montana, business owners in Montana, Montana dude ranchers and non-residents who hunt in Montana.

Appellants challenge the constitutionality of the following two statutory schemes relating to big game hunting embodied in Section 26-202.1, R.C.M., 1947:

1. The license fee structure which grossly discriminates against the non-resident hunter.

2. The arbitrary imposition upon non-resident hunters, but not resident hunters, of the big game "combination" license for the right to hunt certain species of big game, particularly elk. In the 1975 hunting season, in order to hunt elk in Montana, the non-resident hunter was required to purchase a "combination" license ($151.00 fee) which entitled him to take one elk and two deer. The resident was not required to purchase a "combination" license, but instead could purchase a license solely for elk at a cost of $4.00. In the 1976 hunting season, in order to hunt elk in Montana, the non-resident was required to purchase a "combination" license ($225.00 fee) which entitled him to take one elk, one deer, and one black bear. The resident was not required to purchase a "combination" license in 1976, but instead could purchase a license solely for elk at a cost of $9.00.

Defendants-Appellees are the Fish and Game Commission of the State of Montana, the individual Fish and Game Commissioners of the State of Montana, and Wesley Woodgerd, Director of the Fish and Game Department of the State of Montana.

The challenge of Plaintiffs-Appellants is based on the privileges and immunities clause of Article IV, Section 2 of the United States Constitution and on the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

Plaintiffs' Complaint sought a declaratory judgment that said statutory scheme was unconstitutional, an injunction against enforcement of the statute and damages for each non-resident Plaintiff who had purchased a big game license to the extent that the license fee for non-resident hunters exceeded the costs to the State of Montana "reasonably related to the additional costs of enforcement of the State Fish and Game laws and of contribution to conservation programs." (Complaint, p. 8).

Plaintiffs have taken the position throughout this law suit that the State of Montana could, consistent with the United States Constitution, assess a higher fee for non-resident big game hunting than for residents, but that such higner fee is constitutional only to the extent that it either compensates the State for revenues expended by the State for the added enforcement burden non-residents impose on Montana, if any; and/or, reasonably compensates the State for conservation expenditures made by the State for fish and game purposes from resident-paid taxes. See generally, Mu'aney v. Anderson, 342 U.S. 415 (1952), and Toomer v. Wi 1, 334 U.S. 385 (1948).

A statu three-Judge District Court was convened pursuant to .S.C. 2281.* An evidentiary hearing was held by stip ion before a single Judge and a transcript thereon epared and submitted to the three-Judge Court.

The District Court rendered its decision on August 11, 1976, rejecting all of Plaintiffs' claims (Judge Browning, Circuit Judge, dissenting).

The majority opinion specifically agreed with Plaintiffs that the challenged license fee ratio "...cannot be justified on any basis of cost allocation." (Opinion, p. 4). Nevertheless, the majority opinion held that the privileges and immunities clause is inapplicable; that the challenged classifications, not touching upon a fundamental right, should be reviewed on the "rational relationship" standard; and that the State of Montana could find reasonable basis for the statutory discrimination in the possibility that the political motivation of the Montana

*This statute was repealed on August 12, 1976, P.L. 94-381, 94th Cong., S 537, but such repeal does not apply to any action commencing before that date.

citizenry to underwrite the elk management program might be destroyed if the discrimination were eliminated. (Opinion, pp. 8, 9).

Judge Browning, in dissent, stated that the majority sustained the discrimination "...on a novel theory not suggested by the state or supported by any authority." (Opinion, p. 1, dissent). He relied on Memorial Hospital v. Maricipa County, 415 U.S. 250 (1974), and Cole v. Housing Authority, 435 F. 2d 807 (1st Cir., 1970) for the proposition that "A state may not employ an invidious discrimination to sustain the political viability of its programs. 415 U.S. at 266." (Opinion, p. 3, dissent).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Appellants submit that the actions, opinion and judgment below present substantial questions warranting the acceptance of jurisdiction. The challenge presented by Plaintiffs involves the Montana statutory scheme which discriminates arbitrarily against non-residents who desire to hunt big game, particularly elk, in the State of Montana. Since the challenged burden hinges on the fact of non-citizenship, special questions relating to the "maintenance of our constitutional federalism" are involved. See Austin v. New Hampshire, _____U.S._____, 43 L. Ed. 2d 530 (1975).

Montana presently assesses a fee to the non-resident for the right to hunt elk which is approximately twenty-eight (28) times the fee charged the resident. (See, Opinion, footnote 7, p. 4). Yet, approximately thirty percent (30%) of all land in Montana is Federal land (virtually all of which is accessible to hunters),[1] a

[1]Stipulation No. 25, Pre-Trial Order.

"significant portion" of elk habitat in Montana is on Federal land,[2] and seventy-five percent (75%) of all elk taken by hunters in Montana are taken on Federal lands.[3] Furthermore, the financial contribution to Montana hunting by all citizens of the United States is substantial through the Pittman-Robertson Act, 16 U.S.C. 669, et seq. Thus, while Montana is a member of a nation of States and receives substantial support in various forms for its big game hunting program from the Federal government (and all of the citizens of the nation), it apparently feels free to assess whatever burdens it pleases on non-residents. Indeed, the State of Montana argued below that it could exclude entirely non-residents from hunting in Montana if it so desired.

The position taken by the State of Montana in enacting Section 26-202.1, R.C.M., 1947, and in defending this action indicate that the State is thoroughly insensitive to the obligation of Federal citizenship. Unfortunately, the majority opinion of the District Court has sanctioned this position and has, in fact, left the State of Montana free to increase the burden imposed on non-residents.

[2]Stipulation No. 28, Pre-Trial Order.

[3]Stipulation No. 26, Pre-Trial Order.

A. THE ISSUES PRESENTED ARE SUBSTANTIAL BECAUSE IMPORTANT CONSTITUTIONAL QUESTIONS RELATING TO COMITY AMONG THE STATES ARE INVOLVED

Under the statutory scheme here challenged, the State of Montana is arbitrarily limiting the number of non-residents who may come into the State to hunt big game. Appellants recognize that there may well be a shortage of big game in Montana in relation to the demand to hunt. Appellants recognize that any State has a legitimate police power interest in managing its big game. Appellants also recognize that non-resident hunters may be assessed higher fees by the State of Montana to the extent that such non-residents pose additional costs to the State for enforcement and to the extent that residents pay taxes to support the big game program which non-residents do not bear.

Nevertheless, because Montana is part of our Federal constitutional system, and because all national citizens contribute significantly in diverse ways to the enhancement of hunting in Montana, there are constitutional limits to what the State of Montana can do to limit the number of non-resident hunters. The constitutional concern of the United States Supreme Court relating to discrimination by a State against non-residents was recently set forth in Austin v. New Hampshire, _____U.S._____, 43 L. Ed. 2d 530 (1975):

> In resolving constitutional challenges to state tax measures this Court has made it clear that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." (Citing cases). Our review of tax classifications has generally been concomitantly narrow, therefore, to fit the broad discretion vested in the state legislatures. When a

> tax measure is challenged as an undue burden on an activity granted special constitutional recognition, however, the appropriate degree of inquiry is that necessary to protect the competing constitutional value from erosion. See Lehnhausen v. Lake Shore Auto Parts Co., supra, 410 U.S. at 359.
>
> This consideration applies equally to the protection of individual liberties, see Grosjean v. American Press Co., 297 U.S. 233 (1936), and to the maintenance of our constitutional federalism. See Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 164 (1954). (Emphasis added).

The Court further said:

> Since nonresidents are not represented in the taxing State's legislative halls, cf., Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 532-533 (1959) (BRENNAN, J., concurring), judicial acquiescense in taxation schemes that burden them particularly would remit them to such redress as they could secure through their own State; but "to prevent [retaliation] was one of the chief ends sought to be accomplished by the adoption of the Constitution." Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 80 (1920). Our prior cases, therefore, reflect an appropriately heightened concern for the integrity of the standard of review substantially more rigorous than that applied to state tax distinctions among, say, forms of business organizations or different trades and professions. (43 U.S.L.W. 4401, 4402). (Emphasis added).

Although the Montana big game license fee here under challenge is not technically a tax, the rationale of the Austin decision is nevertheless applicable. Just as in the Austin case, important questions relating to our system of constitutional federalism are involved. The Privileges and Immunities Clause of Article IV, Section 2, was established precisely because of the problem of discrimination by states against non-residents.

In the area of fish and wildlife, the problem is becoming more evident as the country becomes more populated and as recreational time becomes more available to

the average person. A report by the Wildlife Management Institute (1971)[4] states:

> Outdoor recreational uses are increasing dramatically, and there is greater tendency to restrict the nonresident as the competition for space and resource becomes more acute. Strangely enough, this reaction often is more apparent in the States having large expanses of public land, scenery, and wildlife. People who choose to reside in such States obviously relish freedom from crowding. They are possessive about abundant opportunities to hunt and fish, and they make no effort to disguise their dislike of nonresident sportsmen, particularly hunters. As a result, they tend to favor controlling the nonresident by imposing higher fees and quotas long before they will accept more controls over themselves. Politically, it is always easier to impose added costs and new restrictions on nonresidents because they have no voice or vote within a particular state. (pp. 12, 13). (Emphasis added).

The very value the Framers intended to protect through the privileges and immunities clause--comity among the States--is threatened by such discriminatory practices against the non-resident.

The majority opinion below did not respond to the issues presented relating to constitutional federalism. The opinion essentially ignored the Privileges and Immunities Clause. However, the most important problem with the opinion below is that it gives the State carte blanche to continue with its discrimination against non-residents and, indeed, increase it. The ultimate conclusion of the majority, if taken seriously by the States, could have disastrous consequences to our Federal system. The holding of the Court is stated as follows:

> We conclude that where the opportunity to enjoy a recreational activity is created or

[4] In 1971, the International Association of Game and Fish Commissioners commissioned the Wildlife Management Institute to prepare this report on non-resident license fee discrimination. This report is Plaintiffs' Exhibit No. 7.

> supported by a state, where there is no nexus between the activity and any fundamental right, and where by its very nature the activity can be enjoyed by only a portion of those who would enjoy it, a state may prefer its residents over the residents of other states, or condition the enjoyment of the nonresident upon such terms as it sees fit. (Opinion, p. 9) (Emphasis added).

The majority is saying that the State is free to do anything it wants regarding non-residents where no fundamental right is involved. This means Montana could exclude totally non-residents or exclude all non-residents except those who will pay dearly for the opportunity or exclude all but redheaded non-residents. The open-ended nature of the Court's opinion can only be read as sanctioning total freedom on the part of the State to favor residents over non-residents in any way whatsoever, no matter how arbitrary, no matter how attenuated the classification is from legitimate game management purposes. This result contains within it disastrous consequences to our Federal structure.

Montana's "combination" big game license is a good example of an arbitrary requirement imposed on non-residents which does not serve any legitimate fish and game management purposes, but which is sustainable under the lower Court's faulty reasoning. For the 1976 season, non-residents, in order to hunt elk, must purchase the "combination" license which includes one elk, one deer, and one black bear. Section 26-202.1, R.C.M., 1947. Residents can purchase a license solely for elk. Black bears hibernate approximately the middle of the hunting season so the non-resident who comes to Montana during the second half of the season has virtually no opportunity

to take advantage of the bear license. (Tr. 17-18, 296). Furthermore, the demand by non-residents to hunt black bear is minimal. (Tr. 27-28). Most important, however, is the evidence which indicates that the combination license works in part to foster waste of game. There was testimony at trial indicating that some non-residents who are hunting for elk only will come upon an animal of another species and shoot it, not because he wants the animal, but because he has been compelled to purchase a license for it. (Tr. 143-144).

Thus, the "combination" license requirement for non-residents is an arbitrary imposition which serves no legitimate fish and game management purposes in any direct way. Indeed, the majority opinion concedes as much (although the opinion failed to address specifically the combination license issue). Nevertheless, the opinion holds that, because the right is recreational and not fundamental, and since there are more potential hunters than game available, the State is free to "condition the enjoyment of the nonresident upon such terms as it sees fit." (Opinion, p. 9). This, in spite of the fact that seventy-five percent (75%) of the elk taken by hunters in Montana are taken on Federal lands.

Thus, the questions presented are substantial both because sensitive issues of comity between the states are involved and because the opinion of the District Court is such an open-ended sanction to arbitrary discrimination by a state against citizens of other states.

B. THE RULING OF THE DISTRICT COURT THAT THE DISCRIMINATION HAS A "REASONABLE" BASIS BECAUSE POLITICAL SUPPORT BY THE MONTANA CITIZENRY FOR THE GAME PROGRAM MIGHT ERODE IN THE ABSENCE OF SUCH DISCRIMINATION PRESENTS IMPORTANT FEDERAL QUESTIONS CONCERNING WHETHER SUCH JUSTIFICATION HAS A PLACE IN OUR CONSTITUTIONAL SYSTEM

The present suit was lodged by Plaintiffs challenging the Montana big game license fee discrimination against non-residents and challenging the arbitrary imposition of the "combination" license upon non-residents, but not residents. The primary basis of Plaintiffs' Complaint is the privileges and immunities clause of Article IV, Section 2, Clause 1, of the United States Constitution, which provides:

> The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states.

It is well established that this clause applies to state regulation of fish and game. Mullaney v. Anderson, 342 U.S. 415 (1952); Toomer v. Witsell, supra. In the Mullaney case, the territorial legislature of Alaska provided for the licensing of commercial fishermen in territorial waters, imposing a $5.00 license fee on resident fishermen and a $50.00 fee on non-residents. The Supreme Court found the non-resident license fee invalid under the privileges and immunities clause, Article IV, Section 2, Clause 1. The Court cited with approval the holding of Toomer v. Witsell, supra, that the state may only "charge non-residents a differential which would merely compensate the state for any added enforcement burden they might impose or for any conservation expenditures from taxes which only residents pay." (At 417). (Emphasis added).

The State of Montana attempted to justify the license fee differential in the present case by arguing that the differential was based on additional enforcement and conservation costs imposed by non-residents to the State of Montana. The majority opinion of the District Court specifically found that the ratio in the State of Montana between the fees assessed non-resident hunters to those assessed resident hunters "cannot be justified on any basis of cost allocation, even with due regard to the presumption of constitutionality." (Opinion, p. 4.) (Emphasis added). Nevertheless, the majority opinion found that the discrimination against non-residents by the State of Montana in their hunting fees is not unconstitutional under the minimal scrutiny test because the Montana Legislature might reasonably make a judgment that the elimination of discrimination against non-resident hunters "might destroy the political motivation to Montana citizens to underwrite the elk management program in the absence of which the species might disappear." Parenthetically, it should be noted that there is little factual basis in the record to support the assumption of the majority concerning what it thought to be critical importance of political support of the Montana citizenry. Only approximately two percent (2%) of the budget of the Fish & Game Department of the State of Montana comes from the general fund (general tax fund) of the State of Montana.[5] The Montana Department of Fish and Game is heavily dependent on license fee income and particularly dependent on revenues derived from non-resident hunters and fishermen (approximately

[5]See Plaintiffs' Exhibit No. 1, Montana Executive Budget.

2/3rds of the Fish and Game Department's license revenue comes from non-residents).[6] Thus, without referring to the evidence, the majority opinion grossly over-estimates the importance of the support of the people of Montana for the fish and game management program in the state.

The most important issue, however, is the substantive legitimacy of the attempt by the District Court to find a conceivably reasonable justification for the discriminatory policies against non-residents in the fact that political support might dwindle if the discrimination were not continued. This issue presents a substantial Federal question which this Court should review. This issue was framed by Judge Browning in his dissent as follows:

> In more general terms, the principal (of the majority) appears to be that the state may burden access by nonresidents to a finite local resource in order to increase the share available to residents and thereby maintain a political base within the state for the support of state efforts to conserve the resource. Put in another way, a state may justify the constitutionality of a discriminatory statute by showing that political support by the class of people to be benefited by the discrimination is necessary in order to continue the program that benefits them. (Opinion, p. 2, 3, dissent).

This is a dangerous attitude for a Federal Court to take in justification of a discrimination by a state against non-residents. Virtually any discrimination by a state against non-residents, no matter how invidious or noxious, could be justified on similar basis. This Court has rejected the invocation of local political support as a constitutional justification for discrimination. In Memorial Hospital v. Maricopa County, Supra, the Supreme

[6]Transcript, p. 34.

Court stated "a state may not employ an invidious discrimination to sustain the political viability of its program." (At 266).

The Supreme Court in the Maricopa County case cited with approval Cole v. Housing Authority, supra, invalidating a city's durational residency requirement for access to low-income housing projects. In Cole, the city argued that durational residential requirement was "often the key to survival of [public] housing" because voters believe such a restriction to be necessary to avoid benefiting newcomers as against long-time residents. The Court of Appeals rejected this reasoning, stating, "the objective of achieving political support by discriminatory means... is not one which the constitution recognizes." (435 F. 2d 813) See also, West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 and Lucas v. Colorado General Assembly, 377 U.S. 713, 736 (1963). See also Griffin v. County School Board, 377 U.S. 218 (1964). (In Griffin, the County School Board closed down its public schools entirely rather than comply with the desegregation decisions of the United States Supreme Court. It is arguable that elimination of the discrimination in compliance with the United States Constitution would have eroded, and in fact did erode, public support of the school system in the county. Nevertheless, the Court found unconstitutional the attempt of the county to close down the public schools holding that the mandate of the United States Constitution could not be avoided in such manner.)

In Edwards v. California, 314 U.S. 160 (1941), the Supreme Court faced an attempt by the State of California

by legislation to block indigents from coming into the state. Although the statute was invalidated under the Interstate Commerce Clause, the Court made the following observation which is pertinent to the present case:

> ...Moreover, the indigent non-residents who are the real victims of the statute are deprived of the opportunity to exert political pressure upon the California legislature in order to obtain a change in policy...
>
> ...
>
> ...The prohibition against transporting indigent non-residents into one state is an open invitation to retaliatory measures.

Similarly, in the present case, if the State of Montana can justify its discrimination on such tenuous grounds, the possibilities for retaliatory measures by sister states becomes almost infinite.

In a case very closely on point, a District Court in Brown v. Anderson, 202 F. Supp. 96 (1962), faced a challenge to an Alaska statute which allowed the state commission to close off certain waters to non-resident salmon fisherman if it appeared that there would not be adequate salmon in such waters to perpetuate the population. The state argued that the provision was reasonable in that it would possibly prevent the destitution of residents (should the salmon fishery become depleted). Alaska argued such residents would become "a burden upon the citizens of Alaska and not on non-residents", (pp. 101-102). The District Court rejected this argument stating:

> There is no exception in the privileges and immunities clause providing for differentiation on the basis of the general welfare of citizens of any state. If such were the case it would be possible to couch a legislative act in such words as to regulate almost all types of endeavor on the sole basis of welfare. We cannot agree with defendants that there is any authority to avoid the effect of the privileges and immunities clause solely under the guise of avoiding economic

losses to residents. The act cannot be sustained on the basis that this is a reasonable basis for difference in application. (Emphasis added).

Also in Russo v. Reed, 93 F. Supp. 554 (1950) (striking down as a denial of privileges and immunities a Maine statute which prohibited non-residents from commercially fishing in the Maine coastal waters in the summer months), the Court stated:

> Application of this principal (privilege and immunities clause) leaves no doubt in our minds that the Maine statute under consideration is invalid. It is not a conservation measure in that it limits the size of fish taken, the size of the catch, or the season for fishing. Such affect as it may have upon conserving the supply of fish arises only from the fact that non-residents as a class are prohibited from fishing in the coastal waters of the state during the summer season, the only time when whiting can be taken in that area...(At 561) (Emphasis added).

In contrast to the authority cited above, the majority opinion cited none. Instead it baldly concluded that is is not unreasonable for the Montana Legislature to worry about erosion of local political support and to base a discriminatory policy against non-residents upon such concern. Since virtually any discriminatory policy, whether against non-residents or other classes, could be justified in a similar way, the ramifications of the District Court ruling are serious. The Federal questions presented are substantial and should be reviewed by the Court.

MONTANA'S STATUTOTY SCHEME RELATING TO NON-RESIDENT BIG GAME HUNTING IS UNCONSTITUTIONAL

The Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution applies to issues of discrimination by a state against non-residents in the administration of fish and game laws. In Toomer v. Witsell, supra, the United States Supreme Court faced a requirement of the State of South Carolina which required non-residents of South Carolina to pay a license fee of $2,500.00 for each shrimp boat which operated in South Carolina's coastal waters, but required residents to pay only a fee of $25.00. The Court held that this discrimination violates the Privileges and Immunities Clause, Article IV, Section 2, of the United States Constitution. The Court stated with regard to this clause:

> The primary purpose of this clause, like the clauses between which it is located--those relating to full faith and credit and to interstate extradition of fugitives from justice--was to help fuse into one Nation a collection of independent sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not restricted to the uncertain remedies afforded by diplomatic processes and official retaliation.
>
> "Indeed, without some provision of the kind removing from the citizens of each state the disabilities of alienage in the other states, and giving them equality of privilege with citizens of those states, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists." Paul v. Virginia, 8 Wall. 168, 180 (1868).

PP. 395, 396 (Emphasis added)

See also Mullaney v. Anderson, supra.

As recently as the 1974 term, the United States Supreme Court applied the Privileges and Immunities clause

to a question relating to an imposition of a tax burden based on the fact of non-residency. Austin v. New Hampshire, _____U.S._____, 43 L. Ed. 2d 530 (1975). In that case, the Court faced a challenge to the New Hampshire Commuters Income tax, the effect of which was that New Hampshire "taxes only the incomes of non-residents working in New Hampshire." (43 U.S.L.W. 4400). The Court (Marshall, J.) found the law unconstitutional, stating:

> The Privileges and Immunities Clause, by making non-citizenship or nonresidency an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism. 43 U.S.L.W. 4401, 4402. (Emphasis added).

In discussing the underlying purpose of the Privileges and Immunities Clause, the Austin Court stated:

> The origins of the clause do reveal, however, the concerns of central import to the Framers. During the preconstitutional period, the practice of some States denying to outlanders the treatment that its citizens demanded for themselves was widespread. 43 U.S.L.W. 4401.

The Court states further:

> Thus, in the first and long the leading explication of the clause, Mr. Justice Washington, sitting as Circuit Justice, deemed the fundamental privileges and immunities protected by the clause to be essentially coextensive with those calculated to achieve the purpose of forming a more perfect Union, including "an exemption from higher taxes or impositions than are paid by the other citizens of the state." Corfield v. Corywell, 6 F. Cas. 546, 552 (No. 3230) CCED Pa., 1825. 43 U.S.L.W. 4401.

See also the recent case, Doe v. Bolton, 410 U.S. 179 (1973) at 200, holding that the privileges and immunities clause, Article IV, Section 2, "protects persons who enter Georgia seeking the medical services that are available there."

Lower Court cases dealing specifically with fish and game discrimination issues have followed the reasoning in Toomer, supra, and Mullaney, supra. In Gospodonovich v. Clements, 108 F. Sup. 234 (1953), the Court faced a challenge to a Louisiana state statute which discriminated against non-residents in the regulation of commercial fishing off the Louisiana coast. The Court, holding the Louisiana statute unconstitutional under the Privileges and Immunities Clause, said:

> It is clear that the distinction between the two types of licenses required by the statutes, for both commercial fishing boats and commercial fisherman, is based solely upon citizenship... (P. 236)
>
> ...These are not conservation measures, they are intended to exclude non-residents from pursuing a common calling of citizens of states bordering on the Gulf of Mexico... (P. 237)

See also, Steed v. Dogen, 85 F. Supp. 956 (W.D. Tex., 1949),holding unconstitutional Texas law which assessed drastically lower license fees for shrimpers who are Texas residents as opposed to non-residents; and Edwards v. Leaver, 102 F. Supp. 698 (D. R.I., 1952), striking down state statute limiting commercial fishing licenses to residents violative of the privileges and immunities clause. See also, Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948), involving the equal protections clause of the Fourteenth Amendment).

The state, in arguing the case below, attempted to distinguish these cases under the privileges and immunities clause on the grounds that the present case poses an issue of recreational hunting as opposed to commercial hunting. This distinction is without merit. In State v. Jack, 539

P. 2d 726 (Mont., 1975), the Montana Supreme Court ruled that Montana's law requiring non-resident hunters to employ local guides while hunting in Montana violated the Federal equal protection clause. Also, in Schakel v. State, 513 P. 2d 412 (Wyo., 1973), the Wyoming Supreme Court ruled unconstitutional on equal protection grounds a similar statute.

The State of Montana also argued below that the State maintained "ownership" over the wild game in the State in its sovereign capacity and that, therefore, a Federal Court is without power to intervene in management decisions of the State relating to its fish and game. This antiquated ownership doctrine was laid to rest in Missouri v. Holland, 252 U.S. 416, Takahashi v. Fish and Game Commission, and Toomer v. Witsell, supra. In Toomer, the Court said:

> The whole ownership theory, in fact is now generally regarded as a fiction expressive in legal shorthand of the importance to its people that the state have powers to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the state exercise that power, like its other powers, so as not to discriminate without reason against citizens of other states. (At. 402).

More recently, this Court faced a constitutional challenge to the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. (Sup. IV) Sections 1331-1340, Kleppe v. New Mexico, ____U.S.____, 44 U.S.L.W. 4878. There the Court said:

> Appellees' contention that the Act violates traditional state power over wild animals stands on no different footing. Unquestionably, the states have broad trustee and police powers over wild animals within their jurisdictions.

> Toomer v. Witsell, 334 U.S. 385, 402 (1948); Lacoste v. Department of Conservation, 263 U.S. 545, 549 (1924); Geer v. Connecticut, 161 U.S. 519, 528 (1896). But as Geer v. Connecticut cautions, those powers exist only "insofar as their exercise may not be incompatible with, or restrained by, the rights conveyed to the federal government by the constitution." 161 U.S. at 528. No doubt it is true that as between a state and its inhabitants the state may regulate the killing and sale of [wildlife] but it does not follow that its authority is exclusive of paramount powers. Missouri v. Holland, 252 U.S. 416, 434 (1920). Thus, the privileges and immunities clause, U.S.Const., Art. IV, Sec. 2, Cl. 1, precludes a state from imposing prohibitory license fees on nonresidents shrimping in its waters. Toomer v. Witsell, supra;... 44 U.S.L.W. 4883

Thus, it is well established that the "ownership" theory, whatever its merits, cannot be invoked to defeat basic constitutional limitations.

For the foregoing reasons, Appellants respectfully submit that the lower Court erred in its holding that the Montana license fee structure does not violate the Constitution. Because the questions presented are substantial, Appellants respectfully urge the Court to review the case.

THIS CASE IS NOT MOOT

The present challenge is lodged against the discriminatory license fee structure for big game in Montana for the 1975 and 1976 seasons. (Section 26-202.1, R.C.M., 1947). By the time this appeal is reviewed, those seasons will have elapsed. It is therefore arguable that this case is moot. However, it should be noted that, in addition to injunctive relief, Plaintiffs requested damages to the extent that they paid unconstitutionally excessive license fees for those seasons. (See Complaint, p. Therefore, an actual controversy still presently exists.

Furthermore, the present case presents a question that is "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515 (1911); Roe v. Wade, 410 U.S. 113, 125 (1973). The non-resident "combination" big game license has been required in Montana for many years in one form or another. The license fee structure which discriminates against the non-resident has also been a routinely renewed provision of Montana law for years even though the precise figures have varied from year to year.

For these reasons, Appellants respectfully submit that this Court should exercise review.

CONCLUSION

For the foregoing reasons it is submitted that the present case presents issues substantial enough to merit full review by the Court.

Dated this 8th day of October, 1976.

GOETZ & MADDEN

By _____
JAMES H. GOETZ
522 West Main Street
P. O. Box 1322
Bozeman, Montana 59715

CERTIFICATE OF SERVICE

I, JAMES H. GOETZ, attorney for Appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 8th day of October, 1976, I served copies of the foregoing Jurisdictional Statement on the parties named hereunder, pursuant to

Rule 33, as follows:

Clayton R. Herron, Esq.
Attorney at Law
P. O. Box 783
Bozeman, Montana 59601

Sherman V. Lohn, Esq.
Attorney at Law
P. O. Box 1287
Missoula, Montana 59801

Chapman, Duff & Lenzine
Attorneys at Law
1709 New York Avenue, N.W.
Washington, D. C. 20006

_____
JAMES H. GOETZ
522 West Main Street
P. O. Box 1322
Bozeman, Montana 59715

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

FILED

10312 1976

JOHN E. PLEMMONS, CLERK
By Dora Lou Sevener
Deputy Clerk

MONTANA OUTFITTERS ACTION GROUP, LESTER BALDWIN, RICHARD CARLSON, JEROME J. HUSEBY, DAVID R. LEE, and DONALD J. MORIS,

Plaintiffs,

v.

FISH AND GAME COMMISSION OF THE STATE OF MONTANA; WESLEY WOODGERD, Director of the Department of Fish and Game of the State of Montana; ARTHUR HAGENSTON; WILLIS B. JONES; JOSEPH J. KLABUNDE; W. LESLIE PENGELLY and ARNOLD RIEDER, Commissioners of the Fish and Game Commission of the State of Montana,

Defendants.

CV 75-80-BU

OPINION

Before: BROWNING, Circuit Judge, and SMITH and JAMESON, District Judges

PER CURIAM:

This case is about elk and the rights of nonresidents to hunt them.1/ The elk, once a plains animal, now lives in the mountains in central and western Montana. The elk is migratory in the sense that it moves from the summer range to

1/ While there are disparities in the price of resident and nonresident fees for other fish and game licenses, only the combination license which permits the nonresident to hunt elk is drawn into controversy here.

the winter range and back, and when this sort of migration occurs near the borders of Montana, the elk drift to and from Montana, Idaho, Wyoming, and Canada. The summer range is in the mountains, and a significant part of it is federally owned. The winter range is in the foothills and valleys, a significant part of which is in private ownership. About 75% of the elk killed are killed on federal lands. The elk is not and never will be hunted commercially. It is an animal much sought for its trophy value, and nonresident hunters are as a group more interested in the trophy than are the resident hunters as a group. In recent years there has been an increase in the number of hunters and a disproportionate increase in the number of nonresident hunters. In the years between 1960 and 1970 there was an increase of 536% in nonresident hunting as compared with an increase of 67% in resident hunting.2/ The preservation of the elk depends upon conservation.

R.C.M. 1947 § 26-202.1(12) provides for a nonresident big game combination license and fixes the fee therefor. A nonresident may not hunt elk without the combination license. The license fee for the 1976 hunting season will be $225.00, and for that fee the nonresident is permitted to take one elk, one deer, one black bear, upland birds, and fish. A

2/ All of the State's objections to the introduction of evidence, which were reserved, are now overruled.

resident[3] will be able to hunt elk in 1976 by the payment of $8.00 for an elk tag[4] and $1.00 for a conservation license.[5]

While a resident is not required to buy any combination of licenses, the cost to him of all of the privileges granted by the nonresident combination license would be $30.00.[6] The ratio is, therefor, 7.5 to 1 in favor of the resident. The claim is that these licensing provisions are discriminatory and in violation of the privileges and immunities clause (art. IV, § 2) and the equal protection and due process clauses (amend. XIV) of the United States Constitution. Plaintiffs concede that the State may constitutionally charge nonresidents more for hunting and fishing privileges than residents because residents, through taxes other than hunting and fishing license fees, contribute to the wildlife management program, but urge that the degree of the disparity cannot be justified on a cost

---

3/ R.C.M. 1947 § 26-202.3(2) provides:
"Any person who has been a resident of the state of Montana, as defined in section 83-303, for a period of six (6) months immediately prior to making application for said license shall be eligible to receive a resident hunting or fishing license."
R.C.M. 1947 § 83-303 provides:
"Every person has, in law, a residence. In determining the place of residence the following rules are to be observed:
"1. It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose . . . ."

4/ R.C.M. 1947 § 26-202.1(4).

5/ R.C.M. 1947 § 26-230.

6/ R.C.M. 1947 § 26-202.1 (1), (2), and (4), and R.C.M. 1947 § 26-230.

basis. While no records are kept which precisely disclose the direct and indirect costs which properly may be apportioned between residents and nonresidents, the plaintiffs did offer the opinion evidence of an economist to the effect that a ratio of no more than 2.5 to 1 can be justified costwise. On a consideration of that evidence, the State's evidence opposing it, and with due regard to the presumption of constitutionality, we find that the ratio of 7.5 to 1 cannot be justified on any basis of cost allocation.[7]

Defendants challenge the plaintiffs' standing. The plaintiffs Moris and Lee are nonresidents who have hunted for elk in Montana in the past and who want to hunt in Montana in the future. They are obviously adversely affected by an increase in nonresident license fees and have standing to maintain this action. The economic interests of Moris and Lee are affected, and that is sufficient. Sierra Club v. Morton, 405 U.S. 727 (1972). Since all issues are presented

---

7/ For a nonresident who wanted to hunt and hunted elk, and elk alone, the ratio is 28.2 to 1. Some part of the difference between the 28.2 to 1 and the 7.5 to 1 ratios may be justified by arguments made in support of the combination license, but, in view of our determination that the fee discrimination at a 7.5 to 1 ratio is not justified costwise, we approach the legal problems involved without resolving the arguments pro and con as to whether the discrimination caused by the combination license is justified.

by Moris and Lee, we do not pass upon the standing of the remaining plaintiffs.[8/]

Defendants suggest that there is no justiciable controversy because the law governing the 1976 hunting season will not be effective until July 1, 1976; the 1975 hunting season is over, and the law governing it cannot affect the plaintiffs.[9/] The problems here raised are those which are "'capable of repetition, yet evading review.'" Roe v. Wade, 410 U.S. 113, 125 (1973). Had plaintiffs waited until July 1, 1976, to commence this action, it is unlikely that a resolution at this court level would be obtained until the 1976 hunting season was over. Absent a repeal of the challenged law, unlikely since the Montana legislature will not meet until January 1977, the plaintiffs will be affected by the present law, and there is now a controversy. We hold the controversy to be justiciable.

The State argues with some support in the authorities that the State owns the animals in their wild state in trust

8/ The plaintiffs are four nonresident hunters, one licensed outfitter, and the Montana Outfitters Action Group, composed of seven licensed outfitters and seven dude ranchers and nonresident hunters. Amicus curiae briefs supporting the validity of the statute were filed by the Montana Outfitters and Guides Association, representing 123 outfitters, and by the International Association of Game, Fish and Conservation Commissioners, representing the wildlife agencies of all 50 states, Canada, Puerto Rico, and Mexico.

9/ While we do not consider the law governing the 1975 hunting season (R.C.M. 1947 § 26-202.1) as it existed prior to the 1975 amendments (Laws of Montana 1975, ch. 91, § 1, ch. 417, § 1, ch. 546, § 1) we do note that the arguments now addressed to R.C.M. 1947 § 26-202.1 as it now exists are equally applicable, except perhaps in degree, to the prior law.

for the beneficial use of the citizens of the State, and that the State may do what it will with its own property.[10/] The plaintiffs contend with some support in the authorities that "[t]he whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource."[11/] We do not here choose between the theories advanced. The State under either theory has the power to manage and conserve the elk, and to that end to make such laws and regulations as are necessary to protect and preserve it.

Whether, in that management, a discrimination between residents and nonresidents is permissible requires an examination of the claimed right, the State purpose involved, and the justifications for the discrimination.

We turn to the nature of the right asserted by the plaintiffs in this case. Not everyone may hunt elk. There

10/ The cases of Geer v. Connecticut, 161 U.S. 519 (1896); McCready v. Virginia, 94 U.S. 391 (1876); In re Eberle, 98 F. 295 (N.D.Ill. 1899), and some language in Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928), lend support to this view. Because of the involvement of elk with the lands of the sovereign United States, the ownership analysis is not as readily applicable to elk as it might be to the Chinese pheasant.

11/ The quotation is from Toomer v. Witsell, 334 U.S. 385, 402 (1948). In Missouri v. Holland, 252 U.S. 416, 434 (1920), Mr. Justice Holmes said, "To put the claim of the State upon title is to lean upon a slender reed." This language was quoted with approval in Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948), and in Toomer v. Witsell, supra. All of the cases cited in this footnote were concerned with migrating fish and birds. The movement of the elk is more a drifting than a true migration.

are too many people and too few elk. If the elk is to survive as a species, the game herds must be managed, and a vital part of the management is the limitation of the annual kill. That limitation may be accomplished in many ways, but all of them involve in some degree a limitation upon hunter days.[12/] The hunter days may be controlled by pricing the license, by conducting lotteries, by limiting the length of the seasons, and by restricting the area of the hunt. Any controlling device, by reason of its effect upon the life circumstances of a potential hunter, may deprive that hunter of any possibility of hunting elk.

Whatever word may be used to describe plaintiffs' asserted rights -- right, privilege, chance -- the asserted right is recreational in character,[13/] and except for a few residents who live in exactly the right place, is expensive recreation. Critically examined, the right asserted here is, therefore, no more than a chance to engage temporarily in a recreational activity in a sister state, and even the chance is dependent upon the willingness of the people of the sister

---

12/ Each day that one hunter is in the field is a hunter day.

13/ We believe that this is sufficient to distinguish this case from Takahashi v. Fish and Game Comm'n, supra; Toomer v. Witsell, supra; and Mullaney v. Anderson, 342 U.S. 415 (1952), all of which were concerned with the fundamental right to pursue a calling or business. In American Communters Ass'n, Inc. v. Levitt, 279 F.Supp. 40 (S.D.N.Y. 1967), aff'd, 405 F.2d 1148 (2d Cir. 1969), the district court expressly distinguished between noncommercial fishing licenses and "commercial fishing rights involving interstate commerce." 279 F.Supp. at 48.

State to manage the subject matter of the recreation -- the elk. The asserted right is not fundamental[14/] and is not protected as a privilege and immunity by art. IV, § 2 of the United States Constitution. United States v. Wheeler, 254 U.S. 281 (1920); Canadian Northern Ry. v. Eggen, 252 U.S. 553 (1920); and Blake v. McClung, 172 U.S. 239 (1898).

We cannot ignore the nature of the right involved in treating the equal protection problem. If the needs for education at the primary level[15/] and at the college level[16/] do not create the fundamental sort of rights which have constitutional protection under the equal protection clause, then certainly the asserted right in this case does not have a constitutional basis and is not fundamental for equal protection purposes. There is simply no nexus between the right to hunt for sport and the right to speak, the right to vote, the right to travel, the right to pursue a calling. We are not, therefore, required to scrutinize the discrimination strictly but only to determine whether the system bears some rational relationship to legitimate State purposes.[17/]

The State purpose is to restrict the number of hunter days. Any regulatory system which imposes a license fee in some sense discriminates against those who can't afford to pay it. As the

---

14/ See Black v. McClung, infra, at 248.

15/ San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

16/ Sturgis v. Washington, 368 F.Supp. 38 (W.D.Wash. 1973), aff'd, 414 U.S. 1057 (1973).

17/ San Antonio Independent School District v. Rodriguez, supra; Hughes v. Alexandria Scrap Corp., ____U.S. ____, 44 U.S.L.W. 4959.

fee increases, the discrimination increases. A regulatory scheme based upon a pure lottery in which a limited number of hunters were chosen would be discrimination-free, but a legislature might with some rationality[18/] conclude that a pure lottery open to all potential elk hunters in the United States might destroy the political motivation to Montana citizens to underwrite the elk management program in the absence of which the species would disappear.[19/]

We conclude that where the opportunity to enjoy a recreational activity is created or supported by a state, where there is no nexus between the activity and any fundamental right, and where by its very nature the activity can be enjoyed by only a portion of those who would enjoy it, a state may prefer its residents over the residents of other states, or condition the enjoyment of the nonresident upon such terms as it sees fit.[20/]

IT IS THEREFORE ORDERED that judgment be entered denying plaintiffs all relief.

DATED this 11th day of August 1976.

18/ If the conclusion is rational, the presumption of constitutionality would require us to consider it.

19/ Were a Montana resident's chances to hunt calculated purely on a population basis, Montana residents would get .34% of the elk licenses issued. On the basis of all elk licenses issued in 1973 (107,675), and the population in 1970 (Montana: 694,409; United States: 203,235,298), Montana residents would have received 366 of them (694,409 divided by 203,235,298, multiplied by 107,675). This figure is unrealistic because in any sort of a drawing allocating licenses, the proportion of applications from Montana to the population of Montana would exceed the proportion of applications from other states to the populations of those states. Montana residents can hunt more cheaply, and probably, because of their proximity to it, are more attracted by hunting. Even so, a legislature looking at the facts might conclude that some relatively small percentage of Montana hunters would be licensed if nonresidents and Montana residents were treated equally.

20/ The results reached in the cases of Geer v. Connecticut, supra, n. 10; McCready v. Virginia, supra, n. 10; In re Eberle, supra, n. 10; and State v. Kemp, 73 S.D. 458, 44 N.W. 2d 214 (1950), appeal dismissed for want of a substantial federal question, 340 U.S. 923 (1951), are in accord with the result reached here.

UNITED STATES GOVERNMENT

Memorandum

TO : CLERK OF COURT - Butte
DATE: August 11, 1976
COPIES: JUDGES BROWNING and JAMESON

FROM : JUDGE SMITH

SUBJECT: Montana Outfitters v. Fish and Game Comm'n - CV 75-80-BU

I certify that Judge Jameson concurs with me in the attached per curiam. Please file it with Judge Browning's dissent attached.

Russell E. Smith
United States District Judge

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

MONTANA OUTFITTERS ACTION GROUP
v. FISH AND GAME COMMISSION - No. 75-80-BU

BROWNING, Circuit Judge, dissenting:

The majority recognizes that the "ownership theory" espoused in early Supreme Court opinions is denigrated in more recent pronouncements. See Toomer v. Witsell, 334 U.S. 385, 402 (1948). Also in disrepute is the "special public interest" theory occasionally advanced to justify state discrimination in favor of its own citizens in matters of "privilege" as distinguished from "right." See Sugarman v. Dougall, 413 U.S. 634, 643-45 (1973); Graham v. Richardson, 403 U.S. 365, 372-74 (1970). All that remains is the traditional Equal Protection issue: Does the higher license fee charged nonresidents for hunting elk in the state serve a legitimate state purpose?

The contention most strongly pressed by the state is that the difference in license fee serves the legitimate purpose of imposing upon nonresidents a fair share of the cost of maintaining the elk herd. As the majority finds, however, "the ratio of 7.5 to 1 [or 28.2 to 1] cannot be justified on any basis of cost allocation." The majority does not discuss the other purposes advanced by the state to support the discrimination -- implying (and I agree) that there is no reasonable relationship between the discriminatory license fee and any of the other purposes advanced by the state. Each such justification is shown by the record to be either logically or factually unsupportable.

The majority nonetheless sustains the discrimination

-/-

75-80-BU

on a novel theory not suggested by the state or supported by any authority.*

The ultimate state interest relied upon by the majority is the unquestionably legitimate and important one of conservation. The asserted relationship between the discriminatory license fee and conservation is not direct. The state employs discrimination, the majority suggests, to further conservation in an indirect and, in my opinion, impermissible way.

The majority holds the discrimination against nonresidents to be justified because the state might rationally conclude that if nonresidents were not discriminated against and thereby discouraged from participating in the elk hunt, the number of residents who could participate would be so small that the residents would be unwilling to maintain a vigorous conservation program. In short, an otherwise invidious discrimination against nonresidents is justified because the state may rationally consider the discrimination necessary to induce residents to support the state program required to conserve the herd.

In more general terms, the principle appears to

*The majority states (note 20) that the result reached in this case is in accord with the results reached in Greer v. Connecticut, 161 U.S. 519 (1896); McCready v. Virginia, 94 U.S. 396 (1876); In re Eberle, 98 Fed. 295 (N.D. Ill. 1899); and State v. Kemp, 73 S.D. 458, 44 N.W.2d 214 (1950), appeal dismissed for want of a substantial federal question 340 U.S. 923 (1951). As the majority notes (note 10), the first three cases rest on the "ownership theory," rejected in subsequent decisions, and, in any event, not readily applicable to elk, 75% of which are killed on federal lands. Dismissal by the Supreme Court of the appeal in State v. Kemp did not involve a ruling that the discrimination was constitutional. The statement filed in the Supreme Court in opposition to jurisdiction pointed out that violations of state statutes not claimed to be unconstitutional had occurred that were sufficient to sustain the conviction.

-2-

FPI-Sandstone
8-3-72-10M-9401

be that the state may burden access by nonresidents to a finite local resource in order to increase the share available to residents and thereby maintain a political base within the state for the support of state efforts to conserve the resource. Put in another way, a state may justify the constitutionality of a discriminatory statute by showing that political support by the class of people to be benefited by the discrimination is necessary in order to continue the program that benefits them.

I do not believe discrimination for such a purpose is permitted by the Equal Protection Clause.

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), involved a constitutional challenge to an Arizona statute requiring a year's residence as a condition to an indigent receiving non-emergency medical care at county expense. The state argued that "the requirement is necessary for public support" of modern and effective public medical facilities because the voters believed the requirement protected them from an influx of low-income families such facilities would otherwise attract. The Supreme Court rejected the argument, stating, "A State may not employ an invidious discrimination to sustain the political viability of its programs." 415 U.S. at 266.

The Supreme Court cited with approval Cole v. Housing Authority, 435 F.2d 807, 812-13 (1st Cir. 1970), invalidating a city's durational residency requirement for access to low-income housing projects. In Cole, the city argued that a durational residential requirement was "often the key to survival of [public] housing" because voters believed such a restriction to be necessary to avoid benefiting newcomers as against longtime residents. The

3-

FPI-Sandstone
8-3-72-10M-9401

Court of Appeals rejected this reasoning, stating, "The objective of achieving political support by discriminatory means . . . is not one which the constitution recognizes." 435 F.2d at 813.

Memorial Hospital and Cole involved infringement of fundamental rights that could be justified only by a compelling state interest. But this does not make them inapplicable. These cases rejected justification of discrimination on political grounds because justification on such a basis is inherently inappropriate, not because the right infringed was fundamental.

A holding that discrimination by the state may be justified by showing that the state could rationally believe such discrimination was necessary to secure political support for a program in the public interest, would lead inevitably, if indirectly, to the conclusion that invidious discrimination can be justified by popular disapproval of equal treatment. As the court said in Cole, such a rule "would rationalize discriminatory classifications which are constitutionally impermissible." 435 F.2d at 812. Addressing essentially the same point in Memorial Hospital, the Supreme Court said: "'[p]erhaps Congress could induce wider state participation in school construction if it authorized the use of joint funds for the building of segregated schools,' but that purpose would not sustain such a scheme." 415 U.S. at 267, quoting Shapiro v. Thompson, 394 U.S. 618, 641 (1969).

The majority's rationale is at odds with the principle that constitutional rights are not subject to abrogation by majority will. As the Court said in West Virginia Board of Education v. Barnette, 319 U.S. 624, 638

(1942): "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversies, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." See also Lucas v. Colorado General Assembly, 377 U.S. 713, 736 (1963).

The rule applied by the majority is impossible to limit. It would immunize even the most arbitrary discrimination from constitutional attack whenever it could be contended reasonably that the discrimination was necessary to obtain political support for the state activity.

Access to outdoor recreation is increasingly important to our society. It is significant, for example, that the number of visitors to national and state parks doubled in the decade 1960-1970. U.S. Department of Commerce, Statistical History of the United States 1970. In fact if [illegible], recreational resources constitute a vital national asset. The sentiment that state residents have a preferred claim to such resources within the state is unworthy of protection "under a Constitution which was written partly for the purpose of eradicating such provincialism." Cole v. Housing Authority, supra, 435 F.2d at 813.

I would hold Montana's discriminatory license fee unconstitutional.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

* *

MONTANA OUTFITTERS ACTION GROUP, LESTER BALDWIN, RICHARD CARLSON, JEROME J. HUSEBY, DAVID R. LEE, and DONALD J. MORIS,

Plaintiffs,

-vs-

FISH & GAME COMMISSION OF THE STATE OF MONTANA; WESLEY WOODGERD, Director of the Department of Fish & Game of the State of Montana; ARTHUR HAGENSTON; WILLIS B. JONES; JOSEPH J. KLABUNDE; W. LESLIE PENGELLY; and ARNOLD RIEDER, Commissioners of the Fish & Game Commission of the State of Montana,

Defendants.

No. 75-80-BU

NOTICE OF APPEAL
TO THE
SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that Montana Outfitters Action Group, Lester Baldwin, Richard Carlson, Jerome J. Huseby, David R. Lee, and Donald J. Moris, Plaintiffs above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the District Court entered in this action on August 11, 1976.

This appeal is taken pursuant to 28 U.S.C. §1253.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Plaintiffs' Complaint
2. Defendants' Answer
3. Pre-Trial Order
4. Volumes I, II and III of the transcript of the Evidentiary Hearing
5. Plaintiffs' Exhibit No. 5

6. Plaintiffs' Exhibit No. 6

7. Plaintiffs' Exhibit No. 7

III. The following questions are presented by this appeal:

1. Whether the Montana statutory scheme relating to big game license fees which imposes substantially nigher license fees on non-resident hunters and which requires that non-resident hunters, but not resident hunters, purchase a "combination" license for various big game in Montana, denies to non-resident hunters their constitutional rights guaranteed them under Article IV, Section 2 (Privileges and Immunities) and the Fourteenth Amendment (Equal Protection) of the United States Constitution.

2. Whether the Montana statutory scheme relating to big game license fees which imposes substantial burdens (financial and otherwise) on non-resident hunters but not on resident hunters, which cannot be reasonably justified on any cost basis, can nevertheless survive a constitutional challenge on the basis that political support of the local citizenry for the big game management program in Montana may evaporate in the absence of discrimination against non-resident hunters.

Dated this 7th day of October, 1976.

GOETZ & MADDEN

By _____
JAMES H. GOETZ
P. O. Box 1322
Bozeman, Montana 59715
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was served upon the following counsel by depositing same in the United States mail in postage prepaid envelopes addressed as follows:

Clayton R. Herron
Attorney at Law
P. O. Box 783
Helena, Montana 59601

Chapman, Duff & Lenzine
Attorneys at Law
1709 New York Avenue, N.W.
Washington, D.C. 20006

Sherman Lohn
Attorney at Law
199 West Pine
P. O. Box 1287
Missoula, Montana 59801

Dated this 7th day of October, 1976.

JAMES H. GOETZ

United States of America
District of Montana ____ } SS

I, the undersigned, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed and foregoing is a true and full copy of an original document on file in my office as such Clerk.

Witness my hand and Seal of said Court this 14th day of October 1976

-2-

JOHN E. PEDERSON
Clerk

By Doreen F. Kingo
Deputy Clerk,